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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

CompTel's Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act

CC Docket No. 98-39

COMMENTS OF SBC COMMUNICATIONS INC.

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EXECUTIVE SUMMARY

The Commission should deny the petition submitted by the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association (collectively "CompTel"). CompTel asks the Commission to rewrite section 251(h) of the Communications Act so that any affiliate of an incumbent carrier that offers local service in the incumbent's territory and has received anything of value from the incumbent is deemed either a "successor or assign" of the incumbent under section 251(h)(1)(B), or a "comparable carrier" that has "substantially replaced" the incumbent under section 251(h)(2). In either case, an affiliate that offered local exchange service in an incumbent carrier's territory would be subject to all the requirements imposed on the incumbent itself by section 251.

I. CompTel's proposed definition of "successor or assign" directly conflicts with the Commission's prior ruling on this issue. In the Non-Accounting Safeguards Order, the Commission defined the terms "successor or assign" for purposes of the 1996 Act. The Commission ruled that the critical question in determining whether an affiliate has become an incumbent carrier's "successor or assign" is whether there has been a transfer of "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)." Non-Accounting Safeguards Order, 11 FCC Rcd at 22054 [¶ 309]. The Commission specifically concluded, contrary to CompTel's assertions here, that an affiliate does not become a "successor or assign" merely because it offers local exchange service in an incumbent's territory. Id. at 22055-56 [¶ 312].

II. CompTel's alternative proposal — that the Commission establish a presumption that an incumbent carrier's affiliate that provides local service in the incumbent's territory should be treated as an incumbent carrier under section 251(h)(2) — utterly distorts the provision's language. To be deemed a "comparable carrier" that has "substantially replaced" an incumbent under section 251(h)(2), a carrier must occupy a dominant position in the local exchange market and have supplanted the incumbent. The mere fact that the affiliate receives something of value from the incumbent cannot automatically mean the affiliate is a section 251(h)(2) "comparable carrier."

III. Even if the Telecommunications Act and the Commission's previous rulings did not preclude CompTel's proposals, they would still be against the public interest and at odds with the purposes of section 251. CompTel's rule would effectively eliminate the possibility of local exchange competition from ILEC affiliates, thereby stifling competition and leaving customers with fewer choices for local exchange service. Moreover, CompTel's proposals would prohibit section 272 Bell Operating Company affiliates from providing local service, and the Commission has already concluded that such a result would be contrary to the public interest. Id. at 22057 [¶ 315]. Finally, CompTel's rules are unnecessary to prevent incumbent carriers from evading compliance with the Act. Detailed safeguards set forth in the Communications Act, Commission regulations, and the general antitrust laws already prohibit discriminatory conduct by an incumbent carrier.

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COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"), on behalf of itself and its subsidiaries, submits these comments in opposition to the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking filed by the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association (collectively "CompTel"). CompTel asks the Commission to rewrite section 251(h) of the Communications Act so that any affiliate of an incumbent local exchange carrier ("ILEC") that offers local exchange service in the ILEC's territory itself becomes an ILEC for purposes of section 251. The Commission has already rejected a comparable proposal in its Non-Accounting Safeguards Order,[1] and it has no authority to adopt it here. In addition to being precluded by statute, moreover, the proposal is directly contrary to the public interest since it would decrease

[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22054-58 [¶¶ 309-317] (1996) aff'd, Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) ("Non-Accounting Safeguards Order").

competition and diversity in local telecommunications markets.

BACKGROUND

Section 251 of the Telecommunications Act of 1996 imposes obligations on three categories of telecommunications carriers. Section 251(a) sets forth general duties that apply to all telecommunications carriers; section 251(b) prescribes more extensive requirements for local exchange carriers; and section 251(c) imposes the most rigorous requirements only on those carriers that qualify as "incumbent local exchange carriers." Because section 251(c)'s requirements are demanding, the Commission has emphasized that the provision covers only incumbent carriers: "Imposing the section 251(c) obligations on a carrier that is not an incumbent LEC would contravene the carefully-calibrated regulatory regime crafted by Congress."[2]

Under section 251(h)(1), an "incumbent local exchange carrier" is either, with respect to an area, (A) a local exchange carrier that provided telephone exchange service on the date the Telecommunications Act of 1996 was enacted and was a member of the National Exchange Carriers Association; or (B) the "successor or assign" of such a carrier. In addition, section 251(h)(2) provides that the Commission may, by rule, treat a local exchange carrier as an incumbent if that carrier occupies a position "comparable" to an incumbent; if the carrier has "substantially replaced" the incumbent; and if such treatment is consistent with the public interest.

[2] Declaratory Ruling and Notice of Proposed Rulemaking, Guam Public Utils. Comm'n, 12 FCC Rcd 6925, 6937-38 [¶ 19] (1997).

CompTel has asked the Commission to issue a rule declaring that any affiliate that offers local service in an incumbent's territory and to which the incumbent "has transferred anything that would be of value in providing in-region local service, such as brand name, capital, or personnel," is a "successor or assign" under section 251(h)(1)(B). CompTel Petition at 11. As a "successor or assign," the affiliate would be subject to all the requirements imposed on the incumbent itself. Alternatively, CompTel wants the Commission to declare that such an affiliate is presumptively a "comparable" carrier under section 251(h)(2) and to be treated as an incumbent. CompTel Petition at 13.

ARGUMENT

CompTel's petition must be denied. The term "successor or assign" in section 251(h)(1)(ii) cannot be defined in the sweeping language that CompTel advocates. Indeed, the Commission has already rejected a comparable proposal. Nor can the statutory definition of "comparable carrier," which is quite specific as to its requirements, be swept aside in favor of a broad "presumption" against ILEC affiliates. Congress used the term "affiliate" elsewhere in the Act and specifically defined it in 47 U.S.C. § 153(1). If Congress had wanted to use that term in section 251(h) it would have done so. The fact that it did not is enough to dispose of CompTel's petition. If any further reason to reject it were required, CompTel's petition is manifestly contrary to the public interest because it would discourage competition and diversity in local exchange service and would discriminate against the Bell Operating Companies by precluding them from offering local exchange services through their long distance affiliates.

I. COMPTEL'S PROPOSED DEFINITION OF "SUCCESSOR OR ASSIGN" MUST BE REJECTED

A. The Commission Has Already Held That the Term "Successor or Assign" Applies Only to an Entity to Which an ILEC Has Transferred Network Elements That Must Be Provided on an Unbundled Basis Pursuant to Section 251(c)(3).

The Commission has already defined "successor or assign" for purposes of the 1996 Act. In its order implementing the non-accounting safeguards of sections 271 and 272, the Commission held that an affiliate does not become a "successor or assign" merely because it provides local exchange service. Non-Accounting Safeguards Order, 11 FCC Rcd at 22055-56 [¶ 312]. Rather, the key factor in determining whether an affiliate is a "successor or assign" of an incumbent LEC is whether there has been a transfer of the "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)." Id. at 22054 [¶ 309] (emphasis added). Thus, under the Commission's regulations, a "successor or assign" of a BOC is an entity to which the BOC has transferred "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)." 47 CFR § 53.207 (emphasis added). The Commission's rules specifically state that an affiliate does not become a successor or assign "solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act." Id.

These regulations were passed by the Commission in the context of section 272, which imposes separate affiliate requirements and other safeguards upon certain services provided by BOCs. Where Congress uses identical words in different parts of the same statute, those words

are presumed to have the same meaning in both places.[3] Moreover, the purpose behind the "successor or assign" language is clearly the same in both places. As the Commission itself explained, the statute includes references to "successors or assigns" because "there are . . . legitimate concerns that a BOC could potentially evade the section 272 or 251 requirements by . . . transferring facilities to another affiliate." See Non-Accounting Safeguards Order, 11 FCC at 22054 [¶ 309] (emphasis added).

Indeed, the requirements of section 272, like those of section 251, only apply to an entity that qualifies as an ILEC under section 251(h). Thus, the issue in the Non-Accounting Safeguards Order was exactly the same as the issue here: what makes an incumbent LEC's affiliate a "successor or assign" such that the affiliate is subject to all of the requirements imposed on the incumbent LEC? It follows that the answer that the Commission gave in that proceeding -- an affiliate of an incumbent LEC becomes a "successor or assign" only when the ILEC has transferred to it the ownership of those "network elements" that section 251(c)(3) requires it to provide on an unbundled basis, 11 FCC Rcd at 22055 [¶ 311] -- is also controlling here.

B. The Term "Successor or Assign" Cannot Be Expanded to Cover Any "Affiliate."

Even if the Commission had not already determined what "successor or assign" means, the expansive definition proposed by CompTel is plainly contrary to the Act. CompTel would

[3] Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); Department of Revenue v. ACF Indus., 510 U.S. 332, 342 (1994).

have the Commission define a "successor or assign" as any affiliate that offers telephone exchange service in an incumbent's territory, under a brand name similar to the incumbent's, using any resources transferred from the incumbent. CompTel Pet. at 11. But an affiliate always receives something from the corporate entity that creates it. Thus, the standard CompTel proposes would simply eliminate the distinction between "affiliate" and "successor or assign." If Congress had intended to include all "affiliates" within the definition of an ILEC, it would have done so expressly in section 251(h). Elsewhere in the 1996 Act -- including in section 251 itself -- Congress repeatedly refers to "affiliates" of "local exchange carriers."[4] The fact that it did not do so in section 251(h) precludes CompTel's efforts to import such a standard into that provision.

In any event, CompTel's proposal makes no sense. An affiliate that is only a reseller -- and thus dependent upon the ILEC itself for the underlying service -- would be physically incapable of complying with ILEC unbundling requirements. Yet, under CompTel's proposal it would be required to do so. As noted above, the Commission explicitly and for good reason rejected this position in the Non-Accounting Safeguards Order. See 11 FCC Rcd at 22055 [¶312] (ruling that an affiliate should not be "deemed an incumbent LEC . . . solely because it offers local exchange services").

CompTel relies on several labor-law cases to argue that its expansive definition of "successor or assign" comports with the "common understanding" of these terms. CompTel Pet. at 9-10. In fact, these cases support the narrower, more focused definition adopted by the Commission. Thus, in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987),

[4] See, e.g., 47 U.S.C. § 251(c)(2)(C); id. § 543(*l*)(1)(D).

the Court looked to "the circumstances of a given situation" to determine "whether the new company 'has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations'." (quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)) (emphasis added). In this situation, the relevant assets are the local exchange facilities -- the so-called "bottleneck" assets -- that section 251 is designed to make available to competitors. Unless those are transferred to the new affiliate, there is no basis for calling that affiliate a "successor" of the ILEC.[5]

CompTel claims that expanding the definition of "successor or assign" is necessary to prevent ILECs from favoring their affiliates. But an ILEC affiliate seeking to provide local exchange service -- even one that has a similar name, that employs some people that previously worked for the ILEC, or that has received financing from the same corporate parent -- is in the same position as any other competing carrier. It will be able to obtain services and facilities from the incumbent subject to the resale and unbundling requirements set forth in section 251(c) only after reaching an interconnection agreement with the incumbent, an agreement that is subject to approval by the State commission and review in federal district court. See 47 U.S.C. § 252(e). In addition, the 1996 Act prohibits an incumbent carrier from favoring an affiliated entity over unaffiliated local exchange carriers, in that it obliges the incumbent to make its

[5] As the Court explained in Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 262 n.9 (1974), "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context." Thus, the Commission properly looked to the purposes of sections 251 and 272 in interpreting this term in the context of the 1996 Act.

facilities available to all carriers on the same terms and conditions that it has offered any other carrier, including the incumbent's affiliates. See id. § 252(i). Thus, contrary to CompTel's intimations, the affiliate will not be a preferred player in the local exchange market in which it participates.

II. COMPTEL'S PROPOSED DEFINITION OF "COMPARABLE CARRIER" MUST BE REJECTED

CompTel proposes, in the alternative, that the Commission establish a presumption that an incumbent carrier's affiliate that provides local service in the incumbent's territory and that has received "anything of value" from the incumbent is a "comparable" carrier under section 251(h)(2). CompTel Pet. at 13-15. This proposal utterly ignores the provision's actual language. Again, if Congress had wished section 251(h)(2) to apply to all affiliates of an ILEC providing local exchange services in the ILEC's territory it would have said so directly. But it did not do so.

Instead, section 251(h)(2) authorizes the Commission to treat a local exchange carrier as an incumbent only when the carrier "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [section 251(h)(1)]"; the carrier has "substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)]"; and "such treatment is consistent with the public interest, convenience, and necessity and the purposes of [section 251]." 47 U.S.C. § 251(h)(2).

None of those requirements is met here. This Commission has recognized that an ILEC is an entity that "control[s] the . . . local exchange network" and possesses substantial "economies of density, connectivity, and scale" such that, in the absence of "compliance with the obligations of section 251(c), [it] can impede the development of telephone exchange service competition."[6] A carrier in a "comparable" position must therefore also "occupy a dominant position in the market for telephone exchange service."[7] A LEC affiliate that does not control the network simply cannot be deemed "comparable" to an incumbent in this critical respect.

Nor can such an affiliate be deemed to have "substantially replaced" the incumbent. In order to have "substantially replaced" a section 251(h)(1) incumbent, a carrier typically must have "supplanted" or "take[n] the place of" such a carrier.[8] The mere fact that an affiliate seeks to serve customers currently served by the incumbent -- otherwise known as competition -- cannot automatically mean that the affiliate has "substantially replaced" the ILEC. Otherwise, all CLECs would qualify insofar as they seek to compete with (and take customers from) the ILEC. As long as the ILEC continues to control its local exchange network and continues to offer

[6] Guam Public Utils. Comm'n, 12 FCC Rcd at 6941 [¶ 27] (1997).

[7] Id.

[8] Id. at 6942 [¶ 28].

service over that network, it has not in any relevant sense been replaced by the affiliate.[9]

Finally, as explained below, CompTel's proposal is consistent with neither the public interest nor the purposes of section 251. For all these reasons, it must be rejected.

III. EVEN IF COMPTEL'S PROPOSALS WERE NOT PRECLUDED BY STATUTE, THEY ARE CONTRARY TO THE PUBLIC INTEREST

Even if CompTel's various proposals were not flatly precluded by statute, they would still be bad policy and contrary to the purposes of section 251. Essentially, CompTel thinks that anytime an incumbent carrier transfers anything of value, including a brand name, capital, or personnel, to an affiliate, that affiliate can offer local exchange service only if it complies with all the requirements imposed on the incumbent itself. Such a rule would effectively eliminate all possibility of local exchange competition from ILEC affiliates. It would therefore stifle rather than advance competition, since customers would ultimately have fewer choices for local exchange service.

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[9] CompTel suggests that ILECs will evade their statutory resale obligations by withdrawing certain services, such as contract service arrangements ("CSAs"), and offering them only through an affiliate. CompTel Pet. at 6. But the ability of an ILEC to eliminate existing retail services is governed by state law, and in the Local Competition Order, the Commission expressly declined to establish any federal regulations governing that subject. First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15978 [¶968] ("Local Competition Order"), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). Moreover, to the extent that the underlying network services offered by the LEC are available to all CLECs, including the ILEC affiliate, on the same terms and conditions, the CLECs have no cause for complaint. They are not in any sense disadvantaged. The Commission indicated that ILECs cannot use CSAs to evade their resale obligations; but it never suggested that ILECs were required to offer CSAs. Id. at 15970 [¶ 948].

The Commission itself has already concluded that the creation of new affiliates to offer local exchange services furthers diversity in local telecommunications markets. The greater this diversity, the more opportunities there are for the experimentation and innovation that advances the opening of the telecommunications industry to competition. Thus, in the Non-Accounting Safeguards Order, the Commission ruled that nothing in the Act prevented a Bell operating company's section 272 affiliate from offering local exchange service. 11 FCC Rcd at 22055 [¶ 312]. "[A]s a matter of policy," concluded the Commission, "regulations prohibiting BOC section 272 affiliates from offering local service do not serve the public interest." Id. at 22057 [¶ 315]. "[T]he increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services." Id.

The standard that CompTel proposes would stand this ruling on its head. In CompTel's view, the transfer of "anything of value" from an incumbent carrier to an affiliate — including a section 272 affiliate — that offers local exchange service in the incumbent's territory means that the affiliate necessarily becomes subject to the requirements imposed on incumbents. Thus, under CompTel's logic, a Bell company's section 272 affiliate that had received anything from the incumbent, such as a similar name, would automatically be deemed an incumbent if it offered local exchange service in the Bell company's territory. Since a Bell company incumbent carrier may not itself offer interLATA services, 47 U.S.C. § 272, CompTel's rule would mean that a section 272 affiliate could never provide local exchange service — directly conflicting with the Commission's previous judgment on this issue.

Nor are the rules that CompTel proposes necessary to ensure that incumbent carriers comply with the requirements of section 251(c). The Act and the Commission's rules set forth numerous mechanisms designed to prevent an incumbent from evading its statutory obligations. As the Commission recognized in the Non-Accounting Safeguards Order, "[t]o the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment, we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws." Non-Accounting Safeguards Order, 11 FCC Rcd at 22057 [¶ 315].[10]

CONCLUSION

For the reasons discussed above, CompTel's petition must be denied. The proposed definition of "successor or assign" directly conflicts with the Commission's prior ruling on this issue in the Non-Accounting Safeguards Order. There the Commission ruled that the critical question is whether there has been a transfer of "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," and that an affiliate does not become a "successor or assign" merely because it provides local exchange service in its incumbent affiliate's territory. Non-Accounting Safeguards Order, 11 FCC Rcd at 22054-56

[10] See also Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15756, 15850 [¶ 163] (1997) (setting forth a number of requirements to prevent independent LECs from engaging in cost misallocation, unlawful discrimination, or a price squeeze).

[¶¶ 309, 312]. Furthermore, the proposed presumption that an incumbent carrier's affiliate is a "comparable carrier" under 251(h)(2) completely distorts the language and intent of that provision. Finally, the proposals, even if not inconsistent with prior Commission rulings and the language of the statute, are contrary to the public interest. The petition should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Evelyn De Jesus, hereby certify that on this 1ST day of May, 1998 a true and correct copy of the foregoing "COMMENTS OF SBC COMMUNICATIONS INC.", regarding CC Docket 98-39, was served by first-class mail, upon the parties indicated on the attached Service List.

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